therefore be judgment for the plaintiff for $7,113 with interest at 6% per annum to the date of realization and taxed costs.

Judgment for the plaintiff.

Solicitors: *Lovelace & Hastings; V. Kandiah Palaruntharam.*

PUBLIC PROSECUTOR v. WONG KONG YOONG

[A.Cr.J. (Azmi J.) January 12, 1964]
[J.B. — Criminal Appeal No. 20 of 1963]

Customs and Excise—Customs duty—Attempt at fraudulent evasion—Dutiable articles concealed under articles not dutiable—Whether articles not dutiable subject to forfeiture—Customs Ordinance, 1952, ss. 110(4) & 122.

Articles which were liable to customs duty were placed in a lorry and concealed by 160 bags of poultry food which was not liable to customs duty. On a question whether a forfeiture order could be made in respect of the 160 bags of poultry food under the Customs Ordinance,

Held: as the bags of poultry food were specially arranged to deliberately conceal the dutiable articles they were goods liable to seizure under section 110(4) of the Customs Ordinance and therefore subject to forfeiture under section 122 of the same Ordinance. The prosecution need not show in such a case that the non-dutiable goods were specifically bought for the purposes of concealing the dutiable goods.

CRIMINAL APPEAL.

Wan Hamzah bin Mohd. Salleh (Deputy Public Prosecutor) for the appellant.

Goh Bin Lay for the respondent.

Azmi J.: This is an appeal by the learned Public Prosecutor against the decision of the learned President in ordering the exhibit viz: 160 bags of poultry goods to be returned to the respondent.

The respondent was charged as follows:

"That you, Wong Kong Yoong at about 12.10 p.m. on 29.8.63, at the Customs Import Bays, Customs Compound, Johore Bahru, in Lorry No: BG 3133 with Trailer No: T/B 832, were knowingly concerned in an attempt at fraudulent evasion of Customs duty amounting to $1,016.00 being the duty on 40 packages containing 110 dozen jars 'Tancho' Pure Vegetable Nourishing Pomade Brilliantine, 6 packages containing 60 dozen bottles 'Peacock' Black Hair Dye, 4 packages containing 20 dozen tins 'Yardley' Brilliantine, 2 packages containing 15 dozen tubes 'Tancho Tique' Brilliantine and 10 packages containing 60 dozen packs 'Aladdin 1002' Playing Cards, valued at $2,176.00, thereby committing an offence under section 131(1)(g) of the Customs Ordinance No. 42/52, and punishable under section 131(1)(i) of the same Ordinance."

The respondent pleaded guilty to the charge.

The relevant facts of the case in so far as this appeal is concerned were, according to the learned President's notes of evidence, as follows:

"In the lorry was consignment of poultry food covered by import note — 7510/8 — P.1.

When the tarpaulin was removed the left side of lorry opened up, found poultry food bags were in 2 rows of 12 stacks. The end of each row was one stack of 5 bags and the other end 10 bags. They were arranged in lengthwise and crosswise. A central compartment was formed and in the compartment was found 62 paper parcels covered by a roll of 5 stacks of bags. The 62 parcels were removed and the packing were found: (the particulars of the articles which are the subject matter of the charge)."

The above would appear to be the manner in which the 160 bags of poultry food were arranged in the lorry around and over the numerous bottles of brilliantine and various types of playing cards, etc., valued at $2,176 which were subject to customs import duties (herein referred to as the dutiable articles). Section 122 says that "all goods liable to seizure under the provisions of this Ordinance other than an aircraft engaged on international carriage shall be liable to forfeiture".

Section 110(1) gives a list of goods which may be seized if it can be shown that in respect of any of them there has been, or there is, reasonable cause to suspect that there has been committed an offence against this Ordinance or any regulation made under it. Any receptacle, package, conveyance, vessel not exceeding two hundred tons nett registered tonnage may be seized. Sub-section (4) says as follows:

"The provisions of this section relating to the seizure of goods shall apply to all the contents of any package or receptacle in which the same are found and to any article used to conceal the same."

The question which I have to decide now is whether the 160 bags which have been placed on all sides of the dutiable articles and on top of them come under the provisions of sub-section (4).

The learned President interpreted the words "any article used to conceal the same" to refer only to such goods which were specially procured for the purpose of concealing the dutiable articles and that the prosecution must prove that the goods were there for no other purpose but for the purpose of concealing the dutiable goods. In this case he held the view that it could reasonably be concluded that the accused must have taken the opportunity to smuggle in the dutiable goods hiding them under some of the bags on crossing the customs check. He also said that for the purpose of hiding the dutiable articles 15 bags would be ample.

The learned Deputy Public Prosecutor submitted that it would not be necessary for the prosecution to show that the 160 bags had been procured specially for the purpose of concealing the dutiable articles. In other words, as I understood him, all that the prosecution has to show is merely the fact that such articles in the circumstances of the case have in fact been used to conceal the dutiable articles.

Mr. Goh, who appeared for the owner of the

poultry food, said that it would be unfair to forfeit all the poultry food bags because they happened to be piled up on top and around the dutiable goods. He also said that the dutiable goods were separately packed in their own packages and just placed under the bags.

The learned Deputy Public Prosecutor also reminded me that poultry food is an article which is not subject to any restriction for its importation into Malaya.

In my opinion the question the learned President had to consider was merely whether or not the bags of poultry food had been deliberately used to conceal the dutiable articles. Whether they were so used or not would depend on the facts of the case.

In this case there is no doubt that the bags were specially arranged to deliberately conceal the dutiable goods, and though it is true that to conceal those dutiable goods it would not appear necessary to utilise all the bags, it is equally true that the more bags were used the less would be the chance of detection. In my view it is not necessary for the prosecution to prove that the bags of poultry food were specially bought or procured for the purpose of concealing the dutiable goods. It is sufficient that the bags had been deliberately used to conceal the latter.

I would, therefore, in the circumstances of case hold that the President should have held that these goods were liable to seizure under section 110(4) and therefore liable to forfeiture under section 122.

I would, therefore, set aside the order of the learned President and direct that the proceeds of the sale of the 160 bags now in possession of the Court be forfeited to the Government.

Order accordingly.

MOHAMED SHARIFF v. PUBLIC PROSECUTOR

[A.Cr.J. (Wee Chong Jin C.J.) January 22, 1964]

[Singapore — Magistrate's Appeal No. 208 of 1963]

Criminal Procedure—Appeal—Question of fact—Inadequate scrutiny of evidence—Failure to consider defence—Setting aside conviction.

In this case the appellant was found guilty of theft because the learned Magistrate believed the prosecution witnesses and disbelieved the appellant's evidence. He treated the case purely as one of theft in relation to an article and failed to consider whether or not the evidence relating to the hostility between the respective employers of the main witnesses who spoke of the actual alleged theft.

Held: (1) this was a case where at the very least the evidence adduced by the defence would create a reasonable doubt whether or not the appellant had committed the offence alleged by the prosecution;

(2) the appellate court was not precluded from looking at the matter afresh and as the learned Magistrate had failed to consider the defence evidence the conviction should be set aside.

[**Editorial Note:** this case is of interest as it is an appeal solely on facts. Counsel referred the Court to *Wintle* v. *Nye* [1959] 1 All E.R. 552; *R.* v. *Ong Choon* [1938] M.L.J. 227; and *Letchumy* v. *Public Prosecutor* (1930), 1 M.C. 129, 131].

MAGISTRATE'S APPEAL.

David Marshall for the appellant.

S.R. Chapkhana (Deputy Public Prosecutor) for the respondent.

Wee Chong Jin C.J.: One starts looking at this appeal from the position that the learned Magistrate has found the appellant guilty because he believed the prosecution witnesses and disbelieved the appellant's evidence as to what took place at the shop on the afternoon in question. If the evidence had been merely as to the incident with regard to the alleged theft I do not think any Court would disturb the Magistrate's finding of fact. But having looked through the record myself and having my attention drawn by counsel for the appellant and looking at the actual article that the appellant was alleged to have stolen it is in my view important then to consider all the evidence that appears in the record of this trial. The learned Magistrate has so I understand from his judgment treated this case purely as one of theft in relation to an article and shut his mind from considering whether or not the evidence relating to the hostility, if it is not too strong a word, between the respective employers of the main witnesses who spoke of the actual alleged theft. Now reading this record without hearing the evidence and seeing the witnesses it is to my mind obviously a case where at the very least the evidence adduced by the defence would create a reasonable doubt whether or not the appellant had committed the offence alleged by the prosecution. Now approaching it from that angle, having considered the judgment of the learned Magistrate I cannot find in it anything which suggests that view of the case ought not to prevail because of the demeanour of the witnesses and the impressions obtained of the witnesses before him.

There is nothing in that judgment which to my mind precludes me from looking at the matter afresh so to speak and although giving due consideration and due weight to the findings of fact by the learned trial Magistrate I can properly and in this particular case I ought to hold that the conviction should be set aside not so much that it was against the weight of the evidence but because in my view the learned trial Magistrate had failed to consider all the evidence that was before him and in that sense had failed to consider the defence evidence.

I would therefore allow this appeal and set aside the conviction and sentence.

Appeal allowed.